# Wan Rawi bin Wan Muda v Mohd Muhili bin A Bakar

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2–22–567 OF 1996
ABDUL AZIZ J
8 FEBRUARY 2002

***Banking*** *— Cheque — Dishonored cheque — Holder suing on bill — Whether must prove presentment — Presentment must be within reasonable time after issue — Whether summary judgment be granted on claim of dishonored cheque — Bills of Exchange Act 1949 s 45(2)(b)*

***Civil Procedure*** *— Summary judgment — Claim on dishonored cheque — Plaintiff claiming on proceeds of sale of shares — Defendant's cheque dishonored — Whether plain and obvious case — Whether triable issues raised — Admission to amount claimed by plaintiff — Whether defendant's affidavit an admission of amount claimed*

The plaintiff paid the defendant, a remisier, RM290,000 to buy and then sell certain shares at a profit. The defendant subsequently gave the plaintiff a cheque for RM334,000, which the plaintiff maintained was the proceeds of sale of the shares. The defendant's cheque was dishonored. The plaintiff claimed that the defendant subsequently paid him RM80,000, leaving a balance of RM254,000 to claim, which he brought this action. The learned senior assistant registrar gave summary judgment for the plaintiff in the sum of RM210,000, thinking that what the defendant was liable for to the plaintiff was the RM290,000 that the plaintiff paid the defendant and that since the defendant had paid RM80,000, the plaintiff was entitled to judgment only for RM210,000. There were two appeals before the court. One was the defendant's appeal against the summary judgment for RM210,000. The other was the plaintiff's appeal against the decision to give him summary judgment for RM210,000 only, instead of RM254,000.

**Held**, allowing the defendant's appeal and dismissing the plaintiff's appeal:

(1) It was necessary for the holder suing on the bill to prove, or at least claim, due presentment. It was also necessary for a plaintiff claiming on a dishonored cheque against the drawer to state when the cheque was issued, when it was presented and to at least claim that presentment on that date was within a reasonable time after its issue. The defendant could then dispute the claim as to reasonable time and the way will then be opened to an examination of the matters that needed to be given regard to in order to determine whether it was a reasonable time (see p 348B, D–E).

(2) In the present case, the defendant's cheque was dated 1 April 1994 and the plaintiff claimed that it was given to him on that date. But neither in his statement of claim nor in his affidavit had the plaintiff said on what date he presented the cheque for

payment. He merely said that the cheque was dishonored by the bank because the account had been closed, and he exhibited the cheque. There was therefore no proof as to that (see p 348F–G).

(3) There was also no material before the court on which to decide whether, having regard to the matters mentioned in para (b) of s 45(2) of the Bills of Exchange Act 1949, the cheque was presented within a reasonable time after its issue. These questions had to be tried and there could be no summary judgment on the claim on the dishonored cheque (see pp 348I–349A).

(4) The defendant could not be liable to pay a total of RM334,000 unless he had sold the shares for that amount. If the plaintiff could no longer wait for the shares to be sold at that price, he could have asked the defendant to sell at a lower price or to return RM290,000 less the RM80,000 that the defendant had paid, which would come to RM210,000. But the plaintiff's case was not one of pursuit of the return of RM210,000. That was borne out by the fact that he was not satisfied with summary judgment for that sum. His case was that the defendant owed him RM334,000 less RM80,000, which came to RM254,000, and he relied on what the defendant said in para 4 in his affidavit. The court did not think para 4 contained an admission that the defendant was indebted to the plaintiff in that sum. Neither did it contain such an admission in respect of any other sum, because it was not concerned with any other sum (see p 352B–D).

**[Bahasa Malaysia summary**

Plaintif membayar defendan, seorang remisier, RM290,000 untuk membeli dan kemudiannya menjual saham-saham tertentu pada kadar yang mendatangkan keuntungan. Defendan kemudiannya telah memberikan plaintif sekeping cek bagi jumlah sebanyak RM334,000, yang mana plaintif menegaskan adalah hasil dari jualan saham-saham tersebut. Cek defendan tersebut telah tidak dilayan. Plaintif menuntut bahawa defendan telah kemudiannya membayar beliau sebanyak RM80,000, dan meninggalkan baki sebanyak RM254,000 untuk dituntut, bagi yang mana beliau telah memulakan tindakan ini. Penolong kanan pendaftar yang arif telah memberikan penghakiman terus untuk plaintif bagi jumlah sebanyak RM210,000, memikirkan bahawa apa yang defendan bertanggungan kepada plaintif adalah sebanyak RM290,000 yang plaintif telah membayar kepada defendan dan oleh kerana defendan telah membayar RM80,000, plaintif adalah berhak kepada penghakiman hanya bagi jumlah sebanyak RM210,000. Terdapat dua rayuan di hadapan mahkamah. Satu daripadanya adalah rayuan defendan terhadap penghakiman terus bagi jumlah sebanyak RM210,000. Yang satu lagi adalah rayuan plaintif terhadap keputusan untuk memberikan beliau penghakiman terus bagi jumlah sebanyak RM210,000 sahaja, dan bukannya sebanyak RM254,000.

**Diputuskan,** membenarkan rayuan defendan dan menolak rayuan plaintif: A

(1) Adalah penting untuk pemunya yang mendakwa atas bil untuk membuktikan, atau sekurang-kurangnya menuntut, pengemukaannya. Adalah juga penting untuk plaintif yang menuntut atas cek yang tidak dilayan terhadap penyuruh bayar untuk menyatakan B bila cek tersebut dikeluarkan, bila ia dikemukakan dan untuk sekurang-kurangnya menuntut bahawa pengemukaan pada tarikh itu adalah di dalam lingkungan masa yang berpatutan selepas pengeluarannya. Defendan boleh kemudiannya mempertikaikan tuntutan tersebut berhubung dengan tempoh masa yang berpatutan dan jalannya akan kemudiannya terbuka untuk C pemeriksaan perkara-perkara tersebut yang perlu dipertimbangkan demi untuk menentukan sama ada ia adalah suatu masa yang berpatutan (lihat ms 348B, D–E).

(2) Dalam kes semasa, cek defendan adalah bertarikh 1 April 1994 dan plaintif menuntut bahawa ia telah diberikan kepada beliau D pada tarikh itu. Tetapi plaintif telah tidak di dalam pernyataan tuntutannya mahupun di dalam afidavitnya menyatakan pada tarikh bila beliau telah kemukakan cek tersebut untuk pembayaran. Beliau hanya menyatakan bahawa cek tersebut telah tidak dilayan oleh bank kerana akaunnya telah ditutup, dan beliau mengekshibitkan cek tersebut. Oleh itu tiada bukti berhubung E dengan perkara itu (lihat ms 348F–G).

(3) Tidak terdapat sebarang bahan di hadapan mahkamah di atas yang mana harus diputuskan sama ada, setelah menimbangkan perkara-perkara yang disebut di dalam perenggan (b) dari s 45(2) Akta Bil Pertukaran 1949, cek tersebut telah dikemukakan di F dalam tempoh masa yang berpatutan selepas pengeluarannya. Persoalan-persoalan ini haruslah dibicarakan dan tidak mungkin terdapat penghakiman terus terhadap tuntutan tersebut ke atas cek yang tidak dilayan itu (lihat ms 348I–349A).

(4) Defendan tidak sesungguhnya bertanggungan untuk membayar G satu jumlah sebanyak RM334,000 melainkan jika beliau telah menjual saham-saham bagi jumlah sebanyak itu. Jika plaintif tidak lagi boleh bersabar untuk penjualan saham-saham tersebut pada harga itu, beliau boleh meminta defendan supaya menjual pada harga yang lebih rendah ataupun supaya memulangkan RM290,000 setelah ditolak RM80,000 yang telah dibayar oleh H defendan, yang mana akan mencapai jumlah sebanyak RM210,000. Tetapi kes plaintif bukannya merupakan kes untuk pengembalian jumlah sebanyak RM210,000. Ini adalah kerana beliau tidak berpuashati dengan penghakiman terus untuk jumlah itu. Kes beliau adalah bahawa defendan berhutang kepada beliau jumlah sebanyak RM334,000 ditolak RM80,000, iaitu jumlah I baki sebanyak RM254,000, dan beliau bergantung pada apa yang diperkatakan oleh defendan dalam perenggan 4 di dalam

afidavitnya. Mahkamah tidak berpendapat perenggan 4 mengandungi pengakuan bahawa defendan berhutang kepada plaintif sebanyak jumlah itu. Ia juga tidak mengandungi pengakuan sedemikian berhubung dengan mana-mana jumlah yang lain, kerana ia tiada kaitan dengan sebarang jumlah yang lain (lihat ms 352B–D).]

**Notes**

For cases on dishonored cheque, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1411–1415.

For cases on summary judgment generally, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5679–6233.

**Legislation referred to**

Bills of Exchange Act 1949 ss 45(1), (2)(b), 46, 55(1)(a), 73(1)

*GK Ganesan* (*Celine J Chelladurai* with him) (*Ganesan Ros Rokiah & Co*) for the plaintiff.

*HM Lee* (*KL Wong & Lim*) for the defendant.

**Abdul Aziz J**: The plaintiff paid the defendant, a remisier, RM290,000 to buy and then sell certain shares at a profit. The defendant subsequently gave the plaintiff a cheque for RM334,000 which the plaintiff maintains is the proceeds of sale of the shares. The defendant's cheque was dishonored. The plaintiff claims that the defendant subsequently paid him RM80,000, leaving a balance of RM254,000 to claim, which he brought this action. The learned senior assistant registrar gave summary judgment for the plaintiff in the sum of RM210,000, obviously thinking that what the defendant was liable for to the plaintiff was the RM290,000 that the plaintiff paid the defendant and that since the defendant had paid RM80,000, the plaintiff was entitled to judgment only for RM210,000.

There are before me two appeals. One is the defendant's appeal against the summary judgment for RM210,000 (encl (9)). The other is the plaintiff's appeal against the decision to give him summary judgment for RM210,000 only, instead of RM254,000 (encl (10)).

Learned counsel for the plaintiff explained in submissions that the plaintiff's claim is on the dishonored cheque for RM334,000, but if he should fail in the claim on that ground, then his claim is on an alleged admission by the defendant that he owed the plaintiff RM254,000.

I shall first deal with the claim on the dishonored cheque. The stand of learned counsel for the defendant is that the plaintiff is not entitled to summary judgment on the claim on the dishonored cheque because there was no due presentment of the cheque and because notice of dishonor had not been given within a reasonable time.

The liability of the drawer of a bill of exchange on its dishonor arises from s 55(1)(a) of the Bills of Exchange Act 1949 ('the Act'), which provides as follows:

The drawer of a bill by drawing it: A

(a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonored, he will compensate the holder ... provided that the requisite proceedings on dishonor be duly taken.

It is clear therefore that the liability of the drawer to compensate the holder of the bill, if it is dishonored, only arises if it is dishonored on due B presentment. In my opinion, it is necessary for the holder suing on the bill to prove, or at least claim, due presentment.

According to s 45(1) of the Act, if the bill is not duly presented for payment, 'the drawer ... shall be discharged'. For the bill to be taken as duly presented for payment, it must be presented in accordance with the rules in C sub-s (2). One of the rules is in para (b). It concerns a bill payable on demand, which a cheque is (s 73(1)). It says 'presentment must be made within a reasonable time after its issue in order to render the drawer liable'. Reasonable time is to be determined having regard to 'the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case'. D

It is therefore necessary for a plaintiff claiming on a dishonored cheque against the drawer to state when the cheque was issued, when it was presented and to at least claim that presentment on that date was within a reasonable time after its issue. The defendant can then dispute the claim as to reasonable time and the way will then be opened to an examination of the E matters that need to be given regard to in order to determine whether it was a reasonable time.

Section 46(1) sets out the circumstances excusing delay in making presentment for payment. So, if the plaintiff acknowledges that there had been delay in making presentment but the delay is excusable, he ought to state the circumstances that will excuse the delay. F

In the present case, the defendant's cheque was dated 1 April 1994 and the plaintiff claims that it was given to him on that date. But neither in his statement of claim nor in his affidavit has the plaintiff said on what date he presented the cheque for payment. He merely says that the cheque was dishonored by the bank because the account had been closed, and he G exhibited the cheque. It goes without saying that neither does he claim that the cheque was presented within a reasonable time after its issue. There is therefore no proof as to that.

It is the defendant who, in para 4 of his affidavit in opposition, claims that the cheque was presented on 6 June 1994, two months after its issue. H

I do not know how he knew the date. The copy of the cheque exhibited by the plaintiff does bear the stamp of Maybank, presumably the plaintiff's bank, bearing an unclear date which could be 6 June 1994 or 6 July 1994.

Besides the fact that the plaintiff has not stated the date when he presented the cheque and has not claimed that he presented the cheque within a reasonable time, there is no material before me on which to decide I whether, having regard to the matters mentioned in para (b) of s 45(2), the cheque was presented within a reasonable time after its issue. The question

A has to be tried and there can be no summary judgment on the claim on the dishonored cheque. Having decided that, I do not propose to consider the question of notice of dishonor.

Before I leave this aspect of the case, I feel I ought to say something about the submission in reply of the plaintiff's counsel on the question of B due presentment. In para 4.3.3 of his written submission in reply, he says, 'In practice, a cheque can remain in circulation for up to six months before it is considered overdue'. If by that he means that so long as a cheque is presented for payment within six months after it was issued, it is duly presented for the purposes of s 45 of the Act, that is not borne out by para (b) of s 45(2) of the Act.

C His submission on due presentment closes with para 4.3.4, where he says:

> The effect of the defendant's submission is that, under s 45 of the Bill of Exchange Act, a cheque not duly presented released the defendant's liability (ie the plaintiff had no cause of action). That submission is incorrect. There D is a distinction between the continuing liability of the defendant as opposed to the language of the section that 'the drawer and indorsers shall be discharged'. That 'discharge' there stated is in respect of the bill, not the pre-existing liability of the defendant, which he has already acknowledged in writing. If the defendant's allegation is correct, then a person who is owed a large sum of money must be left with no cause of action to recover that sum of money, only E on the argument that he presented a cheque of his debtor six months late!

I think the gist of what he means to say there is that although failure of due presentment discharges the defendant in respect of the bill, he is still liable on his 'pre-existing liability', by which I think he means that if a cheque is issued to settle a debt and the cheque is dishonored, but the drawer is discharged from liability on the cheque, he is still liable for the debt. That F is indeed true and it in fact recognizes that the drawer is discharged from liability on the cheque. As to whether the defendant is liable on his 'pre-existing liability', that is what I will now proceed to examine. The liability contended for in this respect is claimed to lie in an alleged acknowledgment by the defendant of a debt of RM254,000 to the plaintiff.

G I begin by mentioning that the plaintiff gave the defendant the sum of RM290,000 to buy 100,000 units of shares at RM2.90 per unit and to sell them at RM3.34 per unit.

There are several curious points in this case that I shall mention as I proceed. The first curious point is the plaintiff's saying in para 6 of his H affidavit that the cheque that he was given on 1 April 1994 was 'kononnya' as payment of the proceeds of sale of the shares. In the English version of the statement of claim (para 4), the word is 'alleged'. Maybe it is just a manner of saying that according to the defendant, that was what the cheque was for, but on the other hand it may be a reflection of the plaintiff's state of mind, that is to say, of his unpreparedness to commit himself to saying I that it was in fact the purpose of the cheque.

I think it was a fair conclusion by the defendant that the cheque was presented on 6 June 1994. As I said, the Maybank stamp on the cheque can

be presumed to be that of the plaintiff's bank. As I said, the date could either be 6 June or 6 July, but, to give the plaintiff the advantage, I shall assume that it is 6 June. The second curious point is the fact that the plaintiff took over two months to present the cheque for payment.

The plaintiff says in para 7 of his affidavit that the defendant subsequently ('kemudiannya') — that is after the dishonor of the cheque, agreed to pay by installments, but so far he has only paid RM80,000. The plaintiff does not expressly state that what the defendant agreed to pay was RM334,000 as compensation for the dishonored cheque and that the RM80,000 was part of that sum, but a person reading para 7 will easily conclude that this is what the plaintiff means. Now the RM80,000 was a total of four payments of different sums, made on 9 May 1994, 21 June 1994, 22 June 1994 and 1 July 1994. There is here another curious point, the third. Contrary to what the plaintiff says, the first payment, which was of RM20,000, was made on 9 May 1994, before the defendant's cheque was dishonored, not subsequent to it. In addition, the question arises, why did the defendant pay RM20,000 before the cheque was dishonored? It could not have been on account of the dishonor of the cheque.

To prove the defendant's acknowledgment of a debt of RM254,000, the plaintiff exhibited a letter from himself and the defendant's reply to it. The plaintiff's letter is dated 29 December 1994, six months after the last of the four payments. In the first two paragraphs the plaintiff says this:

> Cek saudara Bank Islam (M) Bhd bernombor 754085 bertarikh 1 April 1994 sejumlah RM334,000 tidak dapat ditunaikan oleh kerana akaun saudara telah ditutup sebagaimana dokumen-dokumen yang dilampirkan untuk perhatian saudara.
>
> Saya telah berpuluh-puluh kali mencuba menghubungi saudara berhubung dengan perkara ini, tetapi malangnya tidak berjaya. Saudara juga telah berjanji dengan saya semenjak bulan April 1994 lagi untuk menjelaskan kesemua bayaran. Kini, sudah lebih lapan bulan hutang masih berbaki RM254,000.

That means that the payment of RM80,000 was not made because the cheque was dishonored, but was made pursuant to the defendant's alleged promise in April 1994. The two paragraphs, read together, also give the impression that it was by that letter, dated 29 December 1994, that the plaintiff, for the first time, succeeded to notify the defendant of the dishonor of the cheque. Why did the defendant, in the very month in which he issued the cheque, that is April 1994, and before the cheque was dishonored, promise to pay the plaintiff RM334,000? That is another curious point, the fourth.

In the third paragraph, the plaintiff says this:

> Akibat daripada kegagalan saudara menjelaskan hutang saya sejumlah RM254,000 itu, kini saya sendiri telah berhutang sejumlah RM220,000 (tidak termasuk faedah) dengan kawan saya untuk menolong saudara tempoh hari di atas rayuan saudara untuk membeli saham Johan Holdings sejumlah 100,000 unit dengan harga RM290,000. Kini, saya telah menerima surat saman daripada kawan saya sendiri di atas kegagalan saya menjelaskan hutang beliau.

A Is the purchase of 100,000 units for RM290,000 for which the plaintiff had to borrow RM220,000 from his friend another purchase different from the purchase alleged in the statement of claim? It would be odd if it were so. It would be odd if, after getting only RM80,000 of the expected returns of RM334,000, the plaintiff should succumb to the defendant's plea to let him buy another 100,000 shares, and succumb to it so badly that he borrowed B RM220,000 to help ('menolong') the defendant to buy the shares and ran the risk of being sued by his friend. That is the fifth curious point.

The defendant's case, as stated in his affidavit in opposition, to which there has been no reply, is as follows. It was at the time the hope of the plaintiff and the defendant that the shares could be sold at RM3.34 per unit, C but the state of the share market at that time did not enable the shares to be sold at that price. The cheque for RM334,000 was not intended as payment but as an indication of the returns that the plaintiff would receive should the sale at that price materialize. The plaintiff should know that it was so because the defendant had issued other cheques before on that basis. As to the payment of RM80,000, a large part of the money given by the plaintiff D to the defendant was money the plaintiff had borrowed from his friend, and the friend had sued the plaintiff, and the plaintiff had turned to the defendant for help, and the defendant had helped as far as he could by paying the plaintiff RM80,000 on the understanding that when the shares were sold at the desired price, the money paid by the defendant would be deducted from the proceeds.

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Although the defendant's case may sound strange, particularly as regards his cheque being merely an indication of the expected proceeds, the curious points that I have shown up do seem to fit into it so as to lend credence to it.

Now I come to the defendant's letter dated 10 January 1995, in reply F to the plaintiff's letter dated 29 December 1994 that I have given an account of. In para 1, the defendant expressed regret that the plaintiff had banked his cheque even though the defendant had repeatedly told the plaintiff that the cheque was meant for proof of receipt of the plaintiff's money and not as payment. If, said the defendant, the plaintiff recalled past dealings G between them, the plaintiff would recall that the defendant's cheques had always been for proof of receipt of money from the plaintiff. I note that this is not exactly what the defendant said in his affidavit, where he said that the cheque was an indication of the expected returns, but it is possible that what was said in the letter as to the purpose of the defendant's cheque was just an imprecise or general statement, because the cheque patently could not H be proof of receipt of money as it was for more than the amount received.

In para 4 the defendant says this:

> Menjadi hasrat saya sebagai seorang Muslim untuk menyelesaikan baki wang tuan dengan seberapa segera. Walau bagaimanapun keadaan pasaran saham yang tidak menentu telah melambatkan proses tersebut.

I It concerns the balance of RM254,000 after payment of the RM80,000. It therefore concerns the expected returns of RM334,000. What the defendant is in effect saying is that he would try to pay the balance as soon

as he is able to sell the shares at RM3.34 per share. The defendant cannot be construed as acknowledging that the RM254,000 is due and payable, because that would be an admission of liability for RM334,000 when the plaintiff's claim has not been pursued, on the basis that the defendant has received RM334,000 on a sale of the shares. If the defendant admitted that he had received that sum, para 4 would undoubtedly be an acknowledgment of owing RM254,000. But para 4 does not admit receipt of that sum. The defendant cannot be liable to pay a total of RM334,000 unless he has sold the shares for that amount. If the plaintiff could no longer wait for the shares to be sold at that price, he could have asked the defendant to sell at a lower price or to return RM290,000 less the RM80,000 that the defendant had paid, which would come to RM210,000. But the plaintiff's case is not one of pursuit of the return of RM210,000. That is borne out by the fact that he is not satisfied with summary judgment for that sum. His case is that the defendant owes him RM334,000 less RM80,000, which comes to RM254,000, and he relies on what the defendant says in para 4. I do not think para 4 contains an admission that the defendant is indebted to the plaintiff in that sum. Neither does it contain such an admission in respect of any other sum, because it is not concerned with any other sum.

Therefore the plaintiff is not entitled to summary judgment on the basis of acknowledgment of debt.

I allow the defendant's appeal and set aside the order of the learned senior assistant registrar. I dismiss the plaintiff's appeal. I order costs for the defendant of this appeal and of the proceedings before the senior assistant registrar.

*Defendant's appeal allowed and plaintiff's appeal dismissed.*

Reported by Peter Ling